1 James R. Batchelder (CSB # 136347)
   Andrew T. Radsch (CSB # 303665)
2 James F. Mack (CSB # 322056)
   Nancy N. Attalla (CSB # 341070)
3 **ROPES & GRAY LLP**
   1900 University Avenue, 6th Floor
4 East Palo Alto, CA 94303-2284
   Telephone: (650) 617-4000
5 james.batchelder@ropesgray.com
   andrew.radsch@ropesgray.com
6 james.mack@ropesgray.com
   nancy.attalla@ropesgray.com
7
8 Additional counsel on signature page
9
   Attorneys for Plaintiff and Counterclaim Defendant
10 ***YANGTZE MEMORY TECHNOLOGIES COMPANY, LTD.***
   and Counterclaim Defendant
11 ***YANGTZE MEMORY TECHNOLOGIES, INC.***
12
                    UNITED STATES DISTRICT COURT
13   **NORTHERN DISTRICT OF CALIFORNIA**
                    SAN FRANCISCO DIVISION
14

15 YANGTZE MEMORY TECHNOLOGIES   )
   COMPANY, LTD.,   )
16   )
)
17   Plaintiff,   )   Case No. 3:23-cv-05792-RFL
)
18   v.   )   **PLAINTIFF AND COUNTERCLAIM**
)   **DEFENDANTS' RESPONSE TO DEFEDANTS'**
19 MICRON TECHNOLOGY, INC., and   )   **AND COUNTERCLAIM PLAINTIFF'S**
   MICRON CONSUMER PRODUCTS   )   **MOTION FOR PROTECTIVE ORDER**
20 GROUP, LLC,   )
)
21   Defendants.   )   Hearing Date: June 13, 2024
)   Time: 9:00 a.m.
22 MICRON TECHNOLOGY, INC.,   )   Place: Courtroom E, 15th floor
)   Magistrate Judge: Thomas S. Hixson
23   Counterclaim Plaintiff,   )
      v.   )
24   )
   YANGTZE MEMORY TECHNOLOGIES   )
25 COMPANY, LTD., and YANGTZE   )
   MEMORY TECHNOLOGIES, INC.,   )
26   )
           Counterclaim Defendants.   )
27   )
28

RESPONSE TO MOTION FOR PROTECTIVE ORDER   **CASE NO. 3:23-CV-05792-RFL**

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1   Plaintiff and Counterclaim Defendant Yangtze Memory Technologies Company, Ltd.

2 ("YMTC"), and Counterclaim Defendant Yangtze Memory Technologies, Inc. ("YMTI")

3 (collectively, "Yangtze Memory"), respectfully submit this response to Micron's Motion for a

4 Protective Order (ECF No. 55) and ask the Court to reject Micron's proposed provisions and adopt

5 Yangtze Memory's. Yangtze Memory's proposed protective order is attached as Exhibit 1 ("Yangtze

6 Protective Order") to the Declaration of Allen Cross ("Cross Decl."), filed concurrently herewith.

7 Pursuant to the Court's Standing Order, Lang Decl. Ex. 2 (ECF No. 56-2, hereinafter "Parties' Redline

8 Proposed Order") is a redlined comparison of the parties' proposals to the District's Model Order,

9 showing the agreed modifications in redline (unhighlighted), and presenting the parties' competing

10 proposals for the disputed provisions in light blue (Micron) and light orange (YMTC), respectively.

11   Micron seeks unprecedented and unwarranted departures from the Court's Model Protective

12 Order for Litigation Involving Patents, Highly Sensitive Confidential Information and/or Trade

13 Secrets ("Model Order," *available at* https://www.cand.uscourts.gov/forms/model-protective-

14 orders/). But this "court treats the model protective order as setting forth presumptively reasonable

15 conditions regarding the treatment of highly confidential information." *Kelora Sys., LLC v. Target*

16 *Corp.*, No. C 11-01548 CW (LB), 2011 WL 6000759, at *2 (N.D. Cal. Aug. 29, 2011); *see also EPL*

17 *Holdings, LLC v. Apple Inc.*, No. C-12-04306 JST (JSC), 2013 U.S. Dist. LEXIS 71301, at *2-3 (N.D.

18 Cal. May 20, 2013). As such, it is the party that seeks to add restrictions beyond the Model Order that

19 must bear the burden to show that the proposed modifications are reasonable whereas the protections

20 afforded by the Model Order are not. *Cf. In re Deutsche Bank Trust Co. Ams.*, 605 F.3d 1373, 1381

21 (Fed. Cir. 2010). Micron has not satisfied that burden because it cannot.

22   Most notably, Micron proposes significant departures from the Model Order purportedly to

23 address Export Administration Regulations ("EAR") and YMTC's (but not YMTI's) designation on

24 the Department of Commerce's Entity List. Micron's proposals are not necessary, go far beyond what

25 EAR prohibits or restricts, and appear to be without any precedent. Micron has not cited a single case

26 where the types of restrictions it seeks to impose were adopted. In contrast, as discussed further below,

27 there have been multiple patent infringement litigations that have involved Entity List-designated

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1   companies, and in none of those cases has a court adopted provisions anywhere close to what Micron

2   seeks. Rather, in each of them, the protective orders simply state that the parties shall comply with all

3   export control regulations—which is precisely what Yangtze Memory proposes here, and what the

4   N.D. Cal. Model Order provides. Yangtze Memory has searched for and found no case in which a

5   court adopted the types of restrictions that Micron seeks here—likely because additional restrictions

6   are unnecessary. The EAR defines what conduct is prohibited and the parties, counsel, retained

7   experts, and everyone else, are required to follow those regulations—none of which prohibit Micron

8   from providing discovery in litigation to Ropes & Gray. Yet Micron's proposals go far beyond those

9   regulations. Micron's attempt to weaponize EAR here should be rejected.

10   **I.   ISSUES TO BE DECIDED**

11   1)   Where the Model Order does not contemplate a patent acquisition bar at all, whether

12   Micron has met its burden of showing that a patent acquisition bar lasting two years—

13   instead of one year—after the suit's termination is needed here.

14   2)   Where Micron asserts that it is proper and necessary for Micron to make it "source code"

15   information available for inspection only at its corporate headquarters outside of this

16   District, whether YMTC should be permitted to do the same for its "source code"

17   information (especially where Chinese export control laws prohibit the removal of that

18   information from China without governmental authorization).

19   3)   Whether Micron has met its burden of showing good cause for modifying the Model Order

20   to impose restrictions allegedly to address EAR concerns, where those restrictions are

21   unnecessary, unprecedented, and go beyond what EAR itself restricts—and where the

22   Model Order provisions are presumptively adequate to address export control issues.

23   4)   Where the asserted patents are directed to 3D NAND technology and the accused products

24   are 3D NAND, whether the definition of "Technology at Issue" should be broadened to

25   include all 2D NAND technology that does not overlap with 3D NAND technology.

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II.   SUMMARY OF RELEVANT FACTS

Yangtze Memory provided a draft proposed protective order, based on and closely tied to the Model Order, to Micron on February 13, 2024. *See* Cross Decl. Ex. 2.

On March 8, over three weeks later, Micron responded with extensive revisions, many of which had nothing to do with EAR, and others of which sought to hinder Yangtze Memory's preparation of its case. *See* Lang Decl. Ex. 4 (ECF No. 56-4). The proposed changes found in Micron's draft included many provisions to restrict access to Micron information, limit the activities of YMTC's counsel, and require onerous disclosures by YMTC experts. *See* Cross Decl. Ex. 3 (Micron Mar. 8, 2024 Draft Order §§ 1, 7). The proposed changes also included defining the technology at issue in the case to include all NAND memory technology (*id.* § 2.24), a patent prosecution and acquisition bar (*id*. § 8), restrictions on access to source code (*id.* § 9), and added provisions that would require any party to "discontinue" performing any activity that was merely alleged to violate the protective order pending resolution by the Court (*id.* § 14).

On March 26, Yangtze Memory provided additional revisions to the draft order. Yangtze counsel states that the revisions "reverted most changes to the model PO for N.D. Cal.," and to "address[] your concerns about EAR issues, we have added that disclosures permitted under the PO may be made only subject to other law or regulation." Lang Decl. Ex. 5 (ECF 56-5); Cross Decl. Ex. 4 (Yangtze Mar. 26, 2024 Draft Order). The substance of the changes included reverting many of the restrictions and disclosure requirements placed on YMTC and its agents (*see id.* §§ 1, 7), restricting the scope of the technology at issue to "3D NAND" (*see id* § 2.24), removing the prosecution and acquisition bars (*id.* § 8), modifying certain terms related to access to source code (*id.* § 9), and removing terms that would require a party to "discontinue" activities alleged to violate the order pending resolution by the court (*id.* § 14).

Over the following weeks the parties met and conferred extensively. Micron ultimately walked back many of its more onerous proposals—for example, ones that would prohibit Ropes & Gray lawyers working on this case from advising any client, including YMTC, on patent licensing regarding NAND semiconductor technology, effectively seeking to prevent Ropes & Gray from advising

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1   Yangtze Memory about any potential settlement here or the licensing of its patents to anyone. Cross

2   Decl. Ex. 3, §§ 2.23, 8. But certain disputes remained.

3   On April 3, 2024, Micron stated that the parties were at "an impasse on the protective order in

4   connection with three primary issues: (1) EAR-related restrictions, (2) a prosecution bar, (3) source

5   code provisions." Cross Decl. Ex. 5 (Apr. 3, 2024 Lang email to Radsch).

6   On April 4, 2024, the parties met and conferred about the protective order by phone. Lang

7   Decl. ¶ 6 (ECF 56). On May 6, 2024, following the meet and confer, Yangtze Memory provided a

8   draft order to Micron that included each party's proposed terms, as well as a comparison against the

9   Model Order. The parties agreed to a prosecution and acquisition bar of the type that Micron had

10 originally proposed, but disagreed whether it should extend to one year or two years from the final

11 termination of the action. *See* Cross Decl. Ex. 6 ("May 6, 2024 Joint Draft" § 8). However, the parties

12 still disputed the language in § 1 to limit YMTC and its agents from attending any hearings or

13 communicating about "the substance of any infringement claim," the definition of the technology at

14 issue (*id.* § 2), the restrictions on access to confidential materials by YMTC House Counsel, party

15 experts, and authors or custodians (*id.* §§ 7.2-7.3), the disclosure requirements for experts (*id.* §7.4),

16 the specifics where source code must be made available (*id.* § 9(d)), and whether a party must

17 "discontinue" activities alleged to violate the order pending resolution by the court (*id.* § 14).

18   On May 7, 2024, Micron filed its present motion for the Court to issue a protective order.

19 **III.   THE COURT SHOULD REJECT MICRON'S PROPOSALS AND ADOPT**

20 **YANGTZE MEMORY'S**

21   **A.   Micron Has Not Established That an Acquisition Bar Is Necessary, Let Alone**

22   **One of the Breadth Micron Seeks**

23   Yangtze Memory does not believe that an acquisition bar is necessary, nor does the Model

24 Order include or contemplate one. In an effort to reduce the number of disputes, however, Yangtze

25 Memory agreed to Micron's demand for a patent acquisition bar, but only if the scope were narrowly

26 and appropriately tailored in time (lasting one year, not two, after the suit ends) and subject matter (3D

27 NAND, not just any NAND technology). But Micron would not compromise.

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1   Micron advocates departing from the Model Order by seeking the imposition of an acquisition

2   bar, so it is Micron's burden to show "that the information designated to trigger the bar, the scope of

3   activities prohibited by the bar, the duration of the bar, and the subject matter covered by the bar

4   reasonably reflect the risk presented by the disclosure of proprietary competitive information." *In re*

5   *Deutsche*, 605 F.3d at 1381 (remanding lower court's discovery order to consider additional evidence

6   in reevaluating the adoption of a protective order); *see also EPL Holdings*, 2013 U.S. Dist. LEXIS

7   71301 at *13-14 (narrowing the acquisition bar "to the subject matter of [] litigation"). Micron has

8   failed to meet this burden, or even address it.

9   Micron does not explain why an acquisition bar is necessary here. Despite recognizing that

10   there is a dispute as to "what protections are warranted when an Entity Listed entity … has brought an

11   action for patent infringement" (Mot. 2), Micron presents no facts here that support a patent acquisition

12   bar. Acquiring a patent is not an act that falls within the purview of EAR. Instead, Micron cites two

13   cases that purportedly "support[]" a two-year bar without explaining whether the considerations that

14   applied there, also apply here. *See* Mot. 6 (citing *Google LLC v. Sonos, Inc.*, No. 20-cv-03845, 2021

15   U.S. Dist. LEXIS 80725, at *4-7 (N.D. Cal. Apr. 27, 2021); *Catch a Wave Techs., Inc. v. Sirius XM*

16   *Radio, Inc.*, No. C 12-05791, 2013 U.S. Dist. LEXIS 189086, at *1-3 (N.D. Cal. Aug. 6, 2013)). They

17   do not.

18   Adoption of an acquisition bar is not universal. Instead, as demonstrated by the Model Order

19   (which does not include an acquisition bar, even as an optional provision), a bar precluding counsel

20   and others that have received confidential technical information from providing advice on the

21   acquisition of patent rights (*e.g.*, through licensing, mergers, acquisitions, indemnification, etc.) is

22   abnormal. Model Order at §8. Indeed, in *Nazomi Communications, Inc v. Arm Holdings PLC*, this

23   Court rejected the inclusion of an acquisition bar because defendant had not established that the "risk

24   of inadvertent disclosure from attorney to client is so great that an access bar must be imposed." No.

25   C 02-02521-JF, 2002 WL 32831822, at *3 (N.D. Cal. Oct. 11, 2002). And any suggestion that an

26   acquisition bar is necessary because YMTC is a listed entity falls flat since patent rights are not subject

27   to EAR restrictions. Indeed, in two other patent infringement litigations involving parties on the Entity

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1   List, one a defendant (SZ DJI Technology Co., Ltd.) and one a plaintiff (Huawei Technologies Co.,

2   Ltd.), the protective orders adopted there did not include an acquisition bar. *See* Protective Order at

3   9, *Textron Innovations Inc. v. SZ DJI Tech. Co.*, No. 6:21-cv-740 (W.D. Tex. May 5, 2022), ECF

4   No. 76 (hereinafter "Textron Protective Order"); Protective Order at 19-20, *Huawei Techs. Co. v.*

5   *Verizon Commc'ns, Inc.*, No. 2:20-cv-30 (E.D. Tex. June 18, 2020), ECF No. 41 (hereinafter "Huawei

6   Protective Order").

7   Micron's proposed acquisition bar should be rejected because it is overbroad in scope and time.

8   Regarding scope, Micron's proposal encompasses information not relevant to the subject of the

9   dispute—*e.g.*, semiconductor technology related solely to 2D NAND. *Am. GNC Corp. v. LG Elecs.,*

10   *Inc.*, No. 3:17-cv-1090, 2017 U.S. Dist. LEXIS 176306, at *11 (S.D. Cal. Oct. 23, 2017) (rejecting

11   proposed patent acquisition bar when bar encompassed information not relevant to the subject of the

12   dispute). As discussed below in Section III.D, technology used in 2D NAND but ***not*** used in 3D

13   NAND, is beyond the scope of this case, and there is no justifiable basis to extend an acquisition bar

14   to cover information relevant only to 2D NAND but not 3D NAND—which is the subject matter of

15   this suit.

16   Micron's suggestion that the case law supports a two-year bar is equally defective absent any

17   explanation why that duration is necessary here. Indeed, this court has applied a one-year patent

18   prosecution bar and patent acquisition bar in cases involving highly confidential source code. *Uniloc*

19   *USA, Inc. v. Apple Inc.*, No. C 18-00360, 2018 U.S. Dist. LEXIS 110427, at *4-10 (N.D. Cal. July 2,

20   2018).   And sister courts have adopted bars involving material that "may be subject to the US

21   government export control and economic sanctions laws, including the Export Administration

22   Regulations" that terminate as soon as "the individual person(s) cease to have access to the

23   [designated] material." *See* Suppl. Protective Order ¶¶ 24, 39, *Apple, Inc. v. Wi-LAN, Inc.*, No. 3:14-

24   cv-2235, (S.D. Cal Dec. 23, 2014), ECF No. 100; Suppl. Protective Order ¶¶ 24, 39, *WiLAN, Inc. v.*

25   *LG Elecs., Inc.*, No. 3:17-cv-358, (S.D. Cal Nov. 7, 2017), ECF No. 47.

26   Micron's argument that its requested two-year bar is consistent with the Model Order is

27   incorrect because the Model Order does not have an acquisition bar. And the duration of the

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1   prosecution bar in the Model Order (Mot. 6) is irrelevant to the necessity and duration of an acquisition

2   bar. Unlike prosecution bars, which pertain to patent claims that can be newly drafted and amended

3   to cover a company's existing products, acquisition bars would cover patents with established claims.

4   And to the extent acquisition activities encompassed patent applications still in prosecution, then the

5   patent prosecution bar would become effective as to those pending claims to bar advising about those

6   pending claims.

7   **B.**   **Both Sides, Not Just Micron, Should Be Permitted to Make Their Source Code**

8   **Documents Available at Their Company Headquarters**

9   There are two independent reasons why Yangtze Memory should be permitted to make its

10   source code documents available for inspection at its headquarters in Wuhan, China.

11   *First*, Micron acknowledges that it is appropriate, and sometimes necessary, for a litigant to

12   make its source code available for inspection where that information resides—which in the case of

13   YMTC, is at its corporate headquarters in Wuhan, China. In this case, Micron requires production of

14   its source code only at its corporate headquarters in Boise, ID. According to Micron, its source code

15   requires a "Cadence environment," which Micron "has never made … available on a stand-alone

16   computer" outside its own offices. Cross Decl. Ex. 7 (Apr. 4, 2024 Lang email to Radsch). The source

17   code that Micron asserts it can make available only at its headquarters, is the same type of source code

18   that Micron demands YMTC produce outside its headquarters. Like Micron, YMTC is seeking to

19   make its source code available at its corporate office where that code resides; that code does not reside

20   in the United States. While Wuhan may be farther from this District than Boise, travel outside this

21   District for source code review would be required in both cases.

22   Micron's argument for unequal treatment of the parties' source code misses the mark. Micron

23   asserts that YMTC should have to relocate its source code to the United States because YMTC filed

24   suit here. Mot. at 7. But YMTC's source code is not relevant to *YMTC's* claims for infringement;

25   that source code would be relevant only to *Micron's* patent infringement counterclaims. It is Micron,

26   not YMTC, who decided to file those claims in this District. Further, Micron's invocation of Section

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1   9(c) of the Model Order (*see* Mot. at 7) is incongruous with its position that it will make Micron's

2   code available only at Micron's headquarters, not at its counsel's offices.

3   ***Second***, practically speaking, YMTC cannot produce its source code for inspection in the

4   United States due to Chinese export control and related laws that prohibit taking that information out

5   of China without governmental authorization and license. *See* Decl. of Menghao Dai in Supp. of

6   Yangtze Memory's Resp. (submitted concurrently herewith) at ¶¶ 9-18. Conversely, making YMTC's

7   source code computer available for inspection at YMTC's headquarters would enable Micron's

8   experts and counsel to review that information sooner than having to wait while YMTC (or Micron)

9   seeks necessary approvals to take that information out of China, which approvals may not be

10 forthcoming or rapid.

11   As detailed in the attached Declaration of Menghao Dai, a partner at the law firm King & Wood

12 Mallesons in China, YMTC's confidential source code information is subject to the Export Control

13 Law of the People's Republic of China and the Foreign Trade Law of the People's Republic of China

14 (2022 Amendment) and cannot be transported out of China without first seeking and obtaining an

15 appropriate license. *See id.* ¶¶ 9-11, Ex. 5, Ex. 6. YMTC's detailed confidential technical information

16 also is likely subject to China's Data Security Law and the CBDT Security Assessment Measures,

17 which again would require YMTC to first seek and obtain governmental approval before that

18 information may be moved out of China. *See id.* ¶¶ 14-15, Exs. 1-4. Finally, that information also

19 likely is subject to the Law of the People's Republic of China on Guarding State Secrets (2024

20 Revision), which also would require YMTC to obtain governmental authorization before moving that

21 information out of China. *See id.* ¶ 13, Ex. 7.

22   Taking YMTC's source code information out of China without the required authorizations

23 could result in severe administrative or criminal penalties for YMTC, and possibly Micron, as well.

24 *See id.* ¶¶ 12, 17-18. As a result, even if the Court were to adopt Micron's proposal whereby YMTC's

25 source code information must be made available in the United States, YMTC anticipates that it would

26 need to seek further relief from this Court while it seeks to obtain approval from authorities in China

27 to transport that information to the United States. *See id.* ¶ 16. Given Micron's own sensitivities to

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export control regulations applicable to its own source code information, it should come as no surprise to Micron that YMTC's source code information may not leave China without necessary licensure. Accordingly, to address these considerations, too, it is more practical and efficient, and indeed necessary, for YMTC to make its source code information available for inspection at its corporate headquarters—just like Micron is doing.

C. **Micron's Modifications that Purport to Address U.S. Export Control Regulations Are Unnecessary, Unprecedented, and Go Far Beyond Those Regulations**

Micron's modifications to the Model Order to "ensure compliance with EAR," ECF 55 at 8, are unnecessary and unprecedented; exceed the EAR, which supposedly animate Micron's proposals; and, as suggested by Micron's Motion, reflect an unwarranted and unsubstantiated concern that Ropes & Gray lawyers may not comply with EAR or otherwise fulfill their duties as officers of the Court. Micron's modifications should be rejected.

Micron's proposed provisions are unnecessary: First, Micron's modifications to the Model Order to "ensure compliance with EAR" are unnecessary because the parties and their counsel already are required to comply with EAR by operation of law, and it is not the purpose of a confidentiality protective order to ensure compliance with independently binding law. To be sure, nothing in either party's proposed protective order provisions would allow a party or its counsel to ignore other governing law or regulation, including EAR. Put another way, a protective order and export control regulations operate independently and complementary. What a protective order may permit does not trump what other law forbids. And to be sure there is no ambiguity about that, YMTC's proposals include an express statement that any disclosure of designated materials must, of course, be in compliance with all export control regulations. Yangtze Protective Order §§ 7.2, 7.3, 9(j), 14.3.

Second, the District's Model Order already includes an optional "Export Control" provision that subjects the "[d]isclosure of Protected Materials … to all applicable laws and regulations relating to the export of technical data contained in such Protected Material, including the release of such technical data to foreign persons or nationals in the United States or elsewhere." Model Order § 14.3.

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1   Yangtze Memory's proposal includes this language and similar language throughout its proposed

2   protective order. *See* Yangtze Protective Order §§ 7.2, 7.3, 9(j), 14.3. Micron's proposal also includes

3   that Model Order language. *See* Parties' Redline Proposed Order § 14.3. But Micron fails to explain

4   why that language from this District's Model Order, which is presumptively reasonable and sufficient,

5   is insufficient here. Put another way, Micron has not met its burden of showing that its changes to the

6   Model Order are appropriate. *See Rabin v. Google LLC*, No. 22-cv-04547-PCP, 2023 WL 8010231,

7   at *1 (N.D. Cal. Nov. 20, 2023) ("[B]ecause [Defendant] seeks to impose greater restrictions, it bears

8   the burden of showing prejudice or harm that will result if the less restrictive standard order, as

9   modified by Plaintiffs, is imposed."); *see also EPL Holdings*, 2013 U.S. Dist. LEXIS 71301, at *2-3;

10   *In re Deutsche Bank*, 605 F.3d at 1381.

11   ***Micron's proposed provisions are unprecedented:*** Citing no case in support, Micron moves

12   the Court to impose restrictive provisions that exceed the obligations of EAR. Yangtze Memory, on

13   the other hand, proposes adopting the Model Order's language with slight modifications requested by

14   Micron, all of which is consistent with the protective orders that other courts have adopted in cases

15   involving parties listed on the Entity List. *See, e.g.*, Textron Protective Order ¶¶ 11, 14; Huawei

16   Protective Order ¶¶ 7, 9, 12, 14. In none of those cases involving Entity Listed-companies did the

17   court adopt the types of restrictions that Micron seeks here, and Micron cannot establish that the

18   circumstances there are in any relevant way different from the circumstances here, or that those

19   protective orders were inadequate and failed to ensure EAR compliance. Yangtze Memory is aware

20   of no patent infringement suit in which a court adopted the restrictions that Micron proposes here. It

21   appears that Micron is not either.

22   ***Micron's proposals exceed EAR, are ambiguous, and are improper:*** In addition to Micron's

23   proposals being unnecessary and without precedent, they are also not tethered to what EAR prohibits,

24   but seek to go beyond EAR to impose unwarranted and unreasonable burdens on counsel for YMTC.

25   In many cases, too, Micron's proposals are too ambiguous.

26   To be certain, nothing in EAR prohibits disclosure of Micron's confidential technical

27   information to Ropes & Gray as outside counsel for YMTC. Micron effectively concedes as much, in

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1   that it has already produced to Ropes & Gray some information that Micron has contended is subject

2   to EAR; and is proposing protective order provisions that will govern Micron's continued disclosure

3   to Ropes & Gray. Further, the Bureau of Industry and Security, which maintains the Entity List, has

4   been clear that the license requirements and policies of the Entity List apply ***only*** to the specifically

5   named entity—and does not extend to any related companies, affiliates, or even wholly owned

6   subsidiaries.[1] Ropes & Gray is not a listed entity.

7   Micron's additions to **Section 1** go beyond EAR and are ambiguous. The separate provisions

8   of the proposed protective order governing the disclosure of Attorneys Eyes Only or Source Code

9   information, which the parties have already agree to, prohibit dissemination of such information to a

10   party (*e.g.*, YMTC) or employees of a party, so the additions of Section 1 are also not needed.

11   • First, Micron states that its confidential technical information may not be disclosed to

12   any person "associated with YMTC except" for Ropes & Gray and retained experts.

13   But "associated with" is unworkably ambiguous. By its terms, this prohibition would

14   preclude such information from being shared with deposition vendors that YMTC

15   retains for depositions of Micron engineers, meaning that Micron's technical

16   documents could not be used at depositions of Micron's own witnesses; or shared with

17   a document management vendor retained for purposes of litigation; or other litigation

18   support personnel who may permissibly view that information under the confidentiality

19   restrictions of the protective order (*see, e.g.*, Parties' Redline Proposed Order at §§7.2,

20   7.3), but for Micron's proposals for Section 1.

21   • Second, Micron proposes that no YMTC personnel or "agents" may attend any portion

22   of any hearing in which Micron confidential technical information will be discussed.

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24   [1] *See* BIS Website – Entity List FAQs, *available at* https://www.bis.doc.gov/index.php/component/
fsj_faqs/cat/33-entity-list-faqs%23:~:text=The%2520Entity%2520List%2520includes%2520

25   restrictions,entries%2520on%2520the%2520Entity%2520List.#faq_134 (last visited May 21, 2024)
("Subsidiaries, parent companies, and sister companies are legally distinct from listed entities.

26   Therefore, the licensing and other obligations imposed on a listed entity by virtue of its being listed
do not per se apply to its subsidiaries, parent companies, sister companies, or other legally distinct

27   affiliates that are not listed on the Entity List.").

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Micron does not and cannot justify excluding YMTC personnel from attending those portions of a hearing that do not discuss Micron confidential technical information. Indeed, excluding YMTC personnel from the public portion of a hearing would appear to be without precedent. And Micron's concerns can be addressed in the same manner courts typically address situations where a party's confidential technical information is discussed at a hearing: by sealing the courtroom during such discussion and excluding those persons—such as company representatives—who are not permitted access to such confidential information.

- Third, Micron's proposals attempt to police YMTC's counsel's communications with its client that are fundamental to the client-lawyer relationship, depart drastically from EAR, and again appear to be without precedent. Out of "concern that Ropes . . . will communicate with YMTC about whether it has a viable (or poor) case," Mot. 9, a communication central to the client-lawyer relationship, Micron asks the Court to bar "Ropes from indicating to YMTC that [Ropes] views the infringement case against Micron on a particular claim to be strong or weak." This is meritless. Under the EAR, "technology" is defined as: "Information necessary for the 'development,' 'production,' 'use,' operation, installation, maintenance, repair, overhaul, or refurbishing . . . of an item." 15 C.F.R. § 772.1 (2023). A statement that a claim is "strong" or "weak" does not, on its own, provide any of that information. A claim could be strong or weak for many reasons—such as an inability or ability to secure necessary evidence; lack or presence of U.S. sales or other conduct that would infringe; a hard or easy to understand theory; or any other multitude of reasons that do not provide specifics into how Micron's accused products are made. Micron also does not explain why an assertion that a claim is "strong" or "weak" provides any more information about Micron's confidential technical information (it doesn't) than simply saying Micron does or does not infringe a claim, which Micron's proposals confusingly would permit. Micron's proposal may also contravene an attorney's ethical

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1   obligations, and would be improper for that reason, too. *See, e.g.*, Model Rules of Pro.

2   Conduct r. 2.1 ("In representing a client, a lawyer shall exercise independent

3   professional judgment and render candid advice."). It is certainly possible, and

4   permissible under EAR, to describe an infringement claim as strong or weak without

5   providing confidential technical information about Micron's accused products.

6   Micron's additions to **Section 7** similarly go beyond the EAR, and are both unnecessary and

7   inappropriate. As before, the EAR itself as well as the separate provisions of the proposed protective

8   order governing the disclosure of confidential information, which the parties have already agreed to,

9   prohibit inappropriate disclosures to a party (*e.g.*, YMTC) or employees of a party, and the additional

10 restrictions that Micron has proposed throughout Section 7 are not needed. Similarly, there is no good

11 cause for the onerous requirements placed on experts proposed in § 7.4.

12   Micron's additions to **Section 14** are also inappropriate. Specifically, Micron's proposal for

13 § 14.6 would require a party merely accused of violating the protective order to "discontinue the

14 performance of and/or shall not undertake the further performance of any action alleged to constitute

15 a violation" pending a motion for relief by the Court. This provision assumes that a party is guilty

16 until proven innocent and could incentivize Micron to raise a multitude of questionable challenges.

17 The parties have already agreed to a wide range of protections and have agreed that disputes may be

18 resolved by the Court. Micron has failed to show good cause for applying additional restrictions while

19 the Court adjudicates any disputes, which additional restrictions are not found in the Model Order.

20   Finally, Micron's extensive modifications proposed to the Model Order's requirements for the

21 disclosure of a party's experts are unduly burdensome and lack any rational justification. Micron

22 identifies no precedent for expanding the Model Order's disclosure requirements.

23   For example, Micron's proposed increase of the reporting period from five years to ten years

24 is baseless and untethered to EAR, which again Micron asserts animates Micron's requested changes.

25 As Micron recognizes, YMTC was not formed until 2016—eight years ago. Moreover, in *Textron*

26 and *Huawei*, which involved parties on the Entity List, the various reporting periods were between

27 four and six years. Textron Protective Order ¶ 5(e); Huawei Protective Order ¶ 6(d).

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1   Similarly, Micron does not adequately explain how the additional disclosures it seeks, which

2   are not found in the Model Order, would ensure that YMTC's proposed experts will not "disclose[] to

3   YMTC or anyone acting on its behalf" Micron's technical information.   YMTC's experts already

4   would be bound by both the separate protective order limitation on who confidential information may

5   be disclosed to, and the EAR (as well as all other relevant or applicable U.S. law).   In effect, Micron

6   is arguing that YMTC's experts cannot be trusted to comply with those obligations—an argument that

7   is both meritless, and that fails to explain why Micron's additional proposals would somehow ensure

8   compliance where their absence would not.   Nowhere does Micron explain why the independent

9   obligations of EAR are not themselves enough to ensure compliance with EAR.   The Model Order's

10 disclosure requirements, including required disclosures about the expert's past cases, current

11 employer, and identities of "each person or entity from whom the expert has received compensation

12 … in his or her areas of expertise or to whom the expert has provided professional services" over the

13 last five years (Model Order § 7.4(a)(2)), is sufficient assess whether "they are [] operating on behalf

14 of YMTC" (Mot. 11).

15 **D.   The "Technology at Issue" Here Is 3D NAND, Not 2D NAND**

16   The technology in this case is 3D NAND memory.   Yangtze Memory's definition for

17 Technology at Issue is "semiconductor technology used in 3D NAND memory or 3D NAND memory

18 devices" (Yangtze Protective Order § 2.24), which captures the full scope of the technology in this

19 case.   Micron, however, attempts to impose a far heavier burden on experts (Parties' Redline Proposed

20 Order §§ 7.4(a), 7.4(d)) and expand the scope of its proposed prosecution and acquisition bars (Parties'

21 Redline Proposed Order § 8) by sweeping in unrelated 2D NAND technology in the definition of

22 Technology at Issue.[2]

23   As Micron recognized, YMTC accuses six of Micron's 3D NAND memory products, and

24 "YMTC seeks from Micron disclosure of … the development, design, layout, and production of

25 Micron's advanced 3D NAND memory."   Mot. 2, 5.   Similarly, Micron asserts five patents against

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27 [2] This term, as used in § 9(e) of the Parties' Redline Proposed Order, does not materially affect the scope of the software and licenses necessary to review discoverable source code.

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1   YMTC's 3D NAND memory products. Compl. at 19-28, ECF No. 35. And, as Micron alleges, YMTC

2   is a global manufacturer and supplier of 3D NAND memory products and has developed 3D NAND

3   not 2D NAND) storage devices since its founding in 2016. ECF No. 35 at 14-15. Yet Micron argues

4   that "Technology at Issue" should be defined as "related to or capable of use in NAND memory or

5   NAND memory devices," irrespective of whether it relates to 3D NAND.

6   That some techniques and structural components may be applicable to NAND memory in

7   general (Mot. 12-13), does not mean that all semiconductor technology related to or capable of use in

8   2D NAND is at issue in this case. And contrary to Micron's "backbone" argument, the evolutionary

9   process of technology does not put all the elementary building blocks that led to 3D NAND at issue

10   in this case. It is unclear what Micron's concern is. Micron's examples of patented techniques and

11   structures that are "**<u>applicable to</u>** both 2D and **<u>3D NAND</u>**" (Mot. 12-13 (emphasis added))

12   unquestionably fall within Yangtze Memory's proposed definition. That these techniques and

13   structures are applicable to 3D NAND ***and*** technologies other than 3D NAND memory does not

14   remove them from Yangtze Memory's definition. Rather, what is excluded by Yangtze Memory's

15   definition but included by Micron's are technologies relevant ***only*** to 2D NAND that are not also

16   relevant to 3D NAND. And Micron has no explanation as to how technologies not relevant to 3D

17   NAND comprise "Technology at Issue" for a suit squarely about 3D NAND. There is no justification

18   for imposing further restrictions on any prosecution or acquisition bar that may be adopted or for

19   requiring expanded disclosure of expert's history in unrelated fields that pertain to 2D NAND and not

20   3D NAND.

21   **IV.   CONCLUSION**

22   Yangtze Memory's proposed protective order should be adopted.

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24   Respectfully submitted,

25   Date: May 21, 2024   By: */s/ Andrew T. Radsch*
                                                James R. Batchelder (CSB # 136347)
26   Andrew T. Radsch (CSB # 303665)
                                                James F. Mack (CSB # 322056)
27   Nancy N. Attalla (CSB # 341070)
                                                ROPES & GRAY LLP
28
                                                15

1900 University Avenue, 6th Floor
East Palo Alto, CA 94303-2284
Telephone: (650) 617-4000
james.batchelder@ropesgray.com
andrew.radsch@ropesgray.com
james.mack@ropesgray.com
nancy.attalla@ropesgray.com

Rachael Bacha (NYB # 4817938)
1211 Avenue of the America
New York, NY 10036
Telephone: (212) 596-9062
rachael.bacha@ropesgray.com

Allen S. Cross (DCB# 252687)
Nicole S. L. Pobre (DCB # 1735421)
2099 Pennsylvania Avenue,
N.W. Washington, D.C. 20006
Telephone: (202) 508-4600
nicole.pobre@ropesgray.com

Attorneys for Plaintiff and Counterclaim Defendant
YANGTZE MEMORY TECHNOLOGIES
COMPANY, LTD. and Counterclaim Defendant
YANGTZE MEMORY TECHNOLOGIES, INC.

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